

**RULES
OF
DEPARTMENT OF FINANCE AND ADMINISTRATION**

**CHAPTER 0620-3-7
LIMITATIONS OF LIABILITY IN STATE SERVICES**

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0620-3-7-.01 POLICY STATEMENT AND SCOPE OF RULES.

- (1) The General Assembly of Tennessee, in Public Chapter 722 of 2000, authorized this Department to promulgate rules setting forth the circumstances when, and the procedures under which, the State would purchase services while accepting limitations of the liability of contractors for damage claims.
- (2) Public Chapter 722 forbids the State from accepting any limitation of the contractor's liability for intentional torts, criminal acts, or fraudulent conduct. Public Chapter 722 also forbids the State from accepting any limitation of liability for an amount less than two times the value of the contract. Furthermore, neither the Public Chapter nor these regulations authorize the State to indemnify contractors for the acts or negligence of the contractors or third parties. All limitations of liability authorized under these rules must be subject to these limitations.
- (3) These rules shall apply to contracts for the purchase of information technology services that are procured pursuant to the Rules of the Department of Finance and Administration, Chapter 0620-3-3, Personal Service, Professional Service, and Consultant Service Contracts.

Authority: T.C.A. §§4-5-202, 12-4-109, and Public Chapter 722 of 2000. **Administrative History:** Original rule filed May 18, 2001; effective August 1, 2001.

0620-3-7-.02 APPROVAL FOR LIMITATION OF LIABILITY.

- (1) Approval Timeliness.
 - (a) Any request to permit the limitation of contractor liability in a state contract for information technology services must be made and a decision made thereon at the appropriate time in the procurement process to ensure that no such decision shall detrimentally impact the fairness of the procurement or the interests of the state in competitive procurements.
 - (b) Generally, this shall require that such a request be made and a decision rendered prior to the procuring agency request for Department of Finance and Administration approval of the subject procurement method (and a copy of any such approval shall be presented with this request).
 - (c) In a formal Request for Proposals process, however, a procuring agency may determine to request approval for a limitation of liability after receiving written comments from potential proposers pursuant to the process. In which case, the request to limit liability shall be made and a decision rendered prior to the procuring agency request for Department of Finance and Administration approval to amend the Request for Proposals (and a copy of any such approval shall be presented with this request).
 - (d) The agency may request, and the Department of Finance and Administration may authorize, initiation of a new procurement process including a contractor's limitation of liability at any stage

(Rule 0620-3-7-.02, continued)

of the procurement process, in circumstances where the applicable procurement process has failed to provide a qualified proposer.

- (e) The State may accept a limitation of liability, subject to the conditions set forth in regulation 0620-3-7-.01 *supra*, in the course of competitive or non-competitive negotiations authorized by the Commissioner of Finance and Administration pursuant to regulation 0620-2-2-.08 (or any other grant of statutory or regulatory authority authorizing such negotiations).

(2) Approval Process.

- (a) If any agency seeking to purchase information technology services considers it necessary to accept a limitation of liability, it shall submit a request to use a limitation of liability clause to the Commissioner of Finance and Administration.
- (b) The request to use a limitation of liability shall be submitted under the signature of the procuring agency commissioner or chief executive. The request for approval shall contain justification that addresses the following:
 - 1. the text of the limitation of liability sought to be used;
 - 2. the risks of liability to the State created by the information technology services purchased under the contract, and the impact on the State by allowing a limitation;
 - 3. the conditions in the market which justify a limitation of liability;
 - 4. the anticipated impact on the State's procurement if limitation of liability is not allowed; and,
 - 5. the identification of one or more persons in the procuring agency familiar with the information set forth in the request to permit a limitation of liability.
- (c) The request will be approved or disapproved by the Commissioner of Finance and Administration or authorized designee. The Commissioner may approve the language submitted or may authorize acceptance of limitation of liability under alternative language. Any approval will be in writing and detail the specific limitation of liability approved.

(3) Approval Documentation.

- (a) Said written approval permitting a limitation of liability shall be filed with the Comptroller of the Treasury. The written approval shall be presented along with the subject information technology contracting documents submitted to the Department of Finance and Administration for approval processing.

Authority: T.C.A. §§4-5-202, 12-4-109, and Public Chapter 722 of 2000. **Administrative History:** Original rule filed May 18, 2001; effective August 1, 2001.